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No. 514

In the Supreme Court of the United States

OCTOBER TERM, 1960

MICHAEL STONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General.
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OPINION BELOW

The opinions of the Court of Appeals (Pet. 23–34) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 18, 1960. A petition for rehearing was denied on October 3, 1960. The petition for a writ of certiorari was filed on November 2, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was sufficient evidence to support the conviction of the petitioner under Count II of the indictment.

Exhibit No. 2

Ledger Sheet.

(See opposite ☛)

2. Whether an error relating to Count I of a two count indictment was so prejudicial as to require reversal of conviction on Count II.

STATUTE INVOLVED

18 U.S.C. 152 provides in pertinent part:

> Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or
>
> Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding;
>
> * * * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

The petitioner was convicted after trial by jury in the United States District Court for the Southern District of New York under a two count indictment charging violation of 18 U.S.C. 152 (Pet. 24). The first count charged concealment of assets from a trustee in bankruptcy and the second count a false oath in a statement of affairs accompanying a petition for an arrangement (Pet. 24). The petitioner was sentenced to 18 months imprisonment on each count, the sentences to be served concurrently (Pet. 25). On appeal the conviction was affirmed on the second count (Pet. 23–25).

The relevant facts are as follows:

The petitioner was engaged in the dress manufacturing business through the operation of Ellen-Joan Fashions, Inc., a corporation of which he was secretary and a director[1] (Pet. 24, App. 51a–52a, 72a).[2] The petitioner's wife, Anita Stone, was president and sole stockholder of Ellen-Joan Fashions, but took no part in the management or operation of the corporation (Pet. 8, 24, App. 39a–40a). On June 24, 1955, a petition for an arrangement under Chapter 11 of the Bankruptcy Act (11 U.S.C. 701–799) (Pet. 4), was filed on behalf of Ellen-Joan Fashions by the petitioner. The petitioner continued to operate the business until November 17, 1955, when Ellen-Joan Fashions, Inc. was adjudicated a bankrupt and a trustee appointed (Pet. 4).

Count I of the indictment was based on a shortage of dresses worth over $14,000 found on an audit on behalf of the trustee. The person employed by Ellen-Joan Fashions as packer and shipper testified that on at least two occasions he had, on instructions from the petitioner, delivered dresses to buyers without making the charge slips which usually accompanied such deliveries (App. 29a–30a). The Court of Appeals, although not doubting that the jury could properly find the petitioner responsible for the shortage, had some question whether, at the time the trustee was ap-

[1] The petitioner testified that he "regarded Ellen-Joan as my business."

[2] The Appendix to the Government's brief below has been filed with the Court and will be referred to herein as App.

pointed, the petitioner would still have had the missing dresses or their proceeds. On this issue it found that there was barely sufficient evidence to go to the jury. It nevertheless reversed the conviction because of failure to turn over to the petitioner grand jury minutes of his testimony. The petitioner had denied on the stand that there were any dresses missing (App. 64a). On cross-examination, the Government read the petitioner's answer to a question before the grand jury in which he admitted that there was a shortage of dresses (App. 64a, 71a). A request by the petitioner for the grand jury minutes for the purpose of examining his testimony was denied by the court (App. 74a–75a). The grand jury minutes would have shown that the petitioner had stated that he had no knowledge of the alleged shortage until informed of it by the auditor (Pet. 29).

Count II stems from Item 10 of the petition for an arrangement and the accompanying Statement of Affairs filed by the petitioner in behalf of Ellen-Joan Fashions on June 24, 1955 (App. U.S. 2a, 76a–77a). It read as follows:

> 10. *Loans repaid.*
>
> a. What repayments of loans have you made during the year immediately preceding the filing of the original petition herein? Chemical Corn Exchange Bank & Trust Co. repaid full amount of $10,000; David Schwartz repaid full amount of $5,000. Sue Brett repaid full amount of $2,000.00; Michael Stone, Secretary.

repaid $4,660.00 since February 28, 1955—balance due $3,038.00;

ALL AS APPEAR IN THE BOOKS AND RECORDS

* * * * *

Mr. Freedman testified that the books of Ellen-Joan Fashions, Inc. showed that on February 1, 1954, there was a balance due to Anita Stone of $1,980. An entry of May 14, 1954, showed a loan from Anita Stone of $10,000 and an entry of August 25, 1954, showed a transfer of $10,000 from the loan account of Anita Stone to paid-in surplus. On March 22, 1955, there was recorded a loan from Anita Stone $1500. (App. 18a–26a).

The payments to Mrs. Stone were by three checks signed by petitioner as follows (App. 79a):

July 19, 1954, Check No. 3394	$3,000
March 25, 1955, Check No. 4198	$2,000
May 12, 1955, Check No. 4638	$ 220

Mrs. Stone testified that she had used the money from the checks to repay the persons who had made loans to the firm through her (App. 41a). She said that she had borrowed large sums of money from various individuals and companies which she had turned over to her husband's firm (App. 40a–42a); that she had no money of her own (Pet. 8, App. 40a). Two thousand dollars came from one Frankel, a dress manufacturer (App. 42a–43a), to whom she said she gave, as evidence of the loan, a check drawn on Ellen-Joan Fashions made payable to her. She could give no explanation of why the check was made payable to her rather than to Frankel and she did not remember whether she had endorsed the check (App. 43a–44a).

She further testified that she had borrowed "about $3,000" from one Nat Grossman "[A]bout five or six years ago" for the petitioner's business, and that no security was given to Grossman, who was not related to either the petitioner or Mrs. Stone (App. 48a–49a). She said that she repaid Grossman with funds from Ellen-Joan Fashions, but that she did not have the check with which he had been repaid (App. 50a). Neither Frankel nor Grossman received interest on the alleged loans. Mrs. Stone also testified that she had borrowed the money from a Mr. Schwarz under similar circumstances (App. 46a, 50a).

The petitioner also testified that his wife frequently borrowed money from her friends and relatives for the use of his company. He insisted that the proceeds from the checks given to Mrs. Stone had been used to repay some of these loans. However, he was unable to specify which loans had been repaid by Mrs. Stone.

On appeal, the petitioner argued for the first time that payments to Anita Stone in the amount of $2,200 were included in the $4,600 listed as repayments of loans to Michael Stone, and justified this by the fact that loan accounts of Michael Stone were combined in the company ledger in a single account (Pet. 31).

The Court of Appeals held that failure of the petitioner to argue this point at the trial foreclosed its consideration on appeal. The court further held that the error in not permitting the petitioner to view the grand jury testimony did not prejudice petitioner with respect to Count II.

On petition for rehearing, the petitioner urged that inasmuch as the books reflected a transfer of $10,000 from the Stones' loan account to paid-in surplus, in August, 1954, there was no amount due from Mrs. Stone, so that there was no basis for believing that the $3,000 check (given in July, 1954, before the transfer of account) was a repayment of a loan, because Ellen-Joan Fashions did not owe Mrs. Stone any money (Pet. 33). The court held that this was a question of fact which should have been presented to the jury and was not properly before the court on appeal. The petition for rehearing was denied.

ARGUMENT

1. The contention that the evidence is insufficient to support the evidence on Count II is without merit. The government presented, in addition to the Statement of Affairs prepared by the petitioner, the testimony of the auditor (whose competence the petitioner does not question) that the payments to Mrs. Stone were repayments of loans. This testimony was based upon the books and records kept by the petitioner's company, for whose management the petitioner was solely responsible.

The attempted explanation at the trial, by both the petitioner and his wife, that the moneys represented repayments to lenders who had given the money to the wife, in itself supported the interpretation of the books as reflecting repayments of loans. The jury could properly regard them as such. See *Radin v. United States*, 254 F. 2d 45, 49 (C.A. 6), certiorari

denied, 357 U.S. 930; *United States* v. *Rosenberg*, 195 F. 2d 653, 655–656 (C.A. 2). Since, even on this explanation offered by the petitioner and his wife, the statement of affairs did not properly reflect payments of loans, the jury could properly find that the petitioner's oath was both false and knowingly so.

The fact that after conviction the petitioner thought of other explanations to account for the payments reflected in the books does not show that the jury was wrong in accepting what the books reflected and what the petitioner and his wife themselves indicated the books reflected—repayments of loans. Moreover, the fact that, with respect to this one-man business, a new explanation of the repayments was attempted on appeal and, when that failed, a totally inconsistent theory was offered on rehearing (see the Statement, *supra*) hardly carries conviction as to the merits of the new theories.

2. In the light of the very different evidence which supports Count II as against the evidence with respect to Count I, the Court of Appeals properly found that the error in failing to turn over the grand jury testimony as to Count I did not necessitate reversal as to Count II. It is true that the court found that as to one item of his testimony—the petitioner's statement as to his awareness of the shortage of dresses—his testimony before the grand jury was not inconsistent with his testimony at the trial. But even as to Count I, this consistency did not serve to counteract other testimony that the petitioner must have known of and caused the shortage. As to the loans involved in Count II, as set forth above, the attempted explana-

tion which both the petitioner and his wife offered at the trial to the effect that repayments to the wife were in fact repayments to other lenders in itself was an admission that the statement of affairs was false. Under these circumstances, any consistency in the petitioner's testimony with respect to the dresses could not affect the facts showing the falsity of the statements as to loans. The error as to Count I thus did not infect Count II.

CONCLUSION

The decision below is correct and the petition for a writ of certiorari should be denied.

Respectfully submitted.

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